Public-Private Partnership (PPP) in the Philippines:

A Handbook for International Private Investors

Japan International Cooperation Agency

December 2017

Mactan-Cebu International Airport Passenger Terminal Building

PPP for School Infrastructure Project (PSIP) Phase II

NAIA Expressway (Phase II) Project

Bulacan Bulk Water Supply Project

Source: Public-Private Partnership Center of the Philippines

Table of Contents

Preface

This handbook is intended for investors who are considering investing in PPP projects in the Philippines to provide useful information on the overview of PPP market as well as the relevant regulatory and institutional framework, compiled from the investor's perspective.

The economy of the Philippines has been strong, with the annual GDP growth rate ranging between 5.8% to 7.2% from 2012 to 2016. The investment environment has also been improving, with Moody's, Fitch and Standard & Poor's upgrading the long-term sovereign credit rating to investment grade in the Philippines in 2013 and overseas investors reconsidering investment opportunities in the Philippines.

Infrastructure spending and enhanced government spending has been considered essential to support sustainable and inclusive growth in the Philippines. Venturing in PPPs has been promoted as one of the drivers of economic growth in the country. Participation of overseas investors to PPP projects has increased through the government's effort to improve the governance and investment climate in the country. With the current administration's intent to further streamline the PPP process in the Philippines, more opportunities are expected for both local and foreign investments.

The Government of the Philippines has been developing manuals and guidelines as part of the institutional reform of the PPP regime. It has been utilized for the capacity building of national government agencies and local government units as the implementing agencies[1]. This handbook, on the other hand, is prepared mainly for the private investors, including Japanese companies, focusing on the various support measures and institutional framework for realizing PPP projects[2]. Moreover, the handbook is intended to introduce matters that the investors need in evaluating the PPP market in the Philippines.

We hope that this handbook provides salient information for investors interested in the Philippine PPP market.

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[1] PPP Center has issued "National Government Agency Public-Private Partnership Manual" as technical guidance to national government agencies (NGAs) in undertaking PPPs, "A PPP Manual for LGUs" for local governments, and "Sector Guidelines for Health, Agriculture, Education, and Transport". In addition, NEDA has issued "The handbook for Structuring PPPs" as a guidance of responsibility/risk allocation in PPP projects for the contract agencies.
[2] It should be noted that the handbook is prepared based on information available as of November 2017 and therefore the status of the relevant laws/regulations and PPP pipeline projects will be renewed day to day.

Abbreviations

ADR	Alternative Dispute Resolution
BDO	Banco De Oro Universal Bank
BIR	Bureau of Internal Revenue
BOI	Board of Investments
BOT Center	Build-Operate-Transfer Center of the Philippines
BPI	Bank of the Philippine Islands
BSP	Bangko Sentral ng Pilipinas (Central Bank of the Philippines)
CC	ICC Cabinet Committee
CLF	Contingent Liability Fund
DBM	Department of Budget and Management
DBP	Development Bank of the Philippines
DOE	Department of Energy
DOF	Department of Finance
DOH	Department of Health
DOTr[3]	Department of Transportation
DPWH	Department of Public Works and Highways
DTI	Department of Trade and Industry
EO	Executive Order
F/S	Feasibility Study
GAA	General Appropriations Act
GB	Governing Board
GPRAM	Generic Preferred Risk Allocation Matrix
GSIS	Government Service Insurance System
ICC	Investment Coordination Committee of the NEDA Board
IPP	Investment Priorities Plan
IRR	Implementing Rules and Regulations
JV	Joint Ventures
LBP	Land Bank of the Philippines
LGU	Local Government Unit
LOC	Letter of Commitment
MAGA	Material Adverse Government Action
MWSS	Metropolitan Waterworks and Sewerage System
MYOA	Multi-Year Obligational Authority
NEDA	National Economic and Development Authority

[3] This agency used to be called the Department of Transportation and Communications (DOTC)

NGA	National Government Agency
OGCC	Office of the Government Corporate Counsel
OSG	Office of the Solicitor-General
PBAC / SBAC	Project Bids and Awards Committee / Special Bids and Awards Committee
PDMF	Project Development and Monitoring Facility
PhP	Philippine Peso
PINAI	Philippine Investment Alliance for Infrastructure
PMO	Project Management Office
PPP	Public-Private Partnership
PPPGB	PPP Governing Board
PQ	Prequalification
RHQ	Regional Headquarters
ROHQ	Regional Operation Headquarters
ROR	Rate of Return
ROW	Right-of-Way
SEC	Securities and Exchange Commission
USD	United States Dollar
VfM	Value for Money
VGF	Viability Gap Funding
WD	Water District

1. Overview of PPP Market in the Philippines

1.1 PPP as Investment Opportunities

Infrastructure investment through Public-Private Partnership (PPP) in the Philippines has become more attractive as the investment climate has significantly improved due to a combination of positive developments in policies and governing/regulating institutions. The Government of the Philippines has promoted infrastructure development through BOT since the 1980s. Since 2010, the government has made institutional and policy arrangements to facilitate the implementation of PPP projects to spur infrastructural development in the country. At present, the government has been explicit in focusing on finding ways to streamline the PPP process and being more open to PPP projects proposed by private entities. The government has also made pronouncements that more smaller-scale and regionally diversified projects are to be expected, given the intent of the administration to improve infrastructure development in the countryside and areas outside the metropolis.

Institution setting relevant to PPP has proceeded in the past decades, starting with the passing of the first BOT Law (Republic Act no. 6957, approved 1990)[4] amongst ASEAN countries. This served as the legal framework for infrastructure development through private sector initiative. In 2010, the legal framework for PPP was further strengthened to accelerate the development and implementation of PPPs as a major policy initiative with the passing of Executive Order No. 8 Series of 2010. The EO reorganized and renamed the "BOT Center" to the "PPP Center" and laid down its mandate, and transferred organizational attachment from the Department of Trade and Industry (DTI) to the National Economic and Development Authority (NEDA), in order to enhance the PPP governance structure. Additionally, the Implementing Rules & Regulations (IRR) of the amended BOT Law was revised in 2012[5]."

Proper risk sharing between the public and private sectors is key for investment decisions and project evaluation for investors. The government is willing to assume regulatory risk, but will transfer commercial risks, such as demand risks (e.g., traffic volume risks), to the private sector. Institutional improvement has been continuously made in order to help implementing agencies better handle contractual obligations and help boost investor confidence in participating in PPPs.

Prior to 2010, there were challenges in project preparation, one of the reasons being the lack of well-established support schemes for project development in the government due to budget limitations among implementing agencies and weak capability of contract agencies to formulate PPP projects. This has been addressed through the establishment of a Project Development and Monitoring Facility (PDMF)[6], which functions to assist in acquiring project development and transaction advisory expertise,

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[4] BOT Law (Republic Act no. 6957) was amended in 1994 and enforced as Republic Act no. 7718 (amended BOT Law).

[5] For more details, see http://www.neda.gov.ph/wp-content/uploads/2013/12/BOT-Law-IRR-Amendments-2012.pdf

[6] PDMF is a revolving facility where cost drawn from the PDMF funds is reimbursed by the winning bidder upon award of the PPP project, or the IA subject to exceptions provided under the PDMF Guidelines. The consultant is chosen from a group of eligible advisory firms that are short listed in advance. The Panels of Consultants can be found in http://ppp.gov.ph/wp-content/uploads/2014/01/Panel-of-Consulting-Firms_April2015.pdf

probity advisory services and independent consultant services for the implementing agencies that have identified priority projects as possible PPPs. Additionally, PPP pipeline projects have been publicly available/advertised, in order to promote information disclosure regarding the current status of PPP projects, and to gain further confidence from the market. As of 17 November 2017, 37 pipeline projects worth PhP 438.65 Billion are listed, which includes toll roads, urban railways, airports, water supply systems, schools and hospitals, as more investment opportunities are created. Fifteen (15) out of the 37 pipeline projects have already been awarded. Improvement of the investment climate through such institutional reform has been recognized by investors, leading to the implementation of selected PPP projects. Furthermore, the GPRAM, or the Generic Preferred Risk Allocation Matrix was developed to serve as a guide in structuring PPP projects with regard to risks to be borne by the government and private sector. The GPRAM identifies list of risks, preferred allocation, and possible mitigation strategies. The GPRAM and its eventual use is based on the principle that risks should be borne by the party that is best able to manage it.

In the Economist report, "2014 Infrascope: Evaluating the environment for public-private partnerships in Asia-Pacific"[7] which evaluated the environment for PPP in the Asia-Pacific region, such as the readiness and capacity of each country, The Philippines ranked seventh (first in the ASEAN region). It was judged that the enabling environment of regulatory and institutional framework has been improved, and regarded the Philippines as the most advanced PPP market in the ASEAN6[8].

The three major credit-rating agencies have affirmed that the Philippines is of investment grade based on their assessments. As of November 2017, three major credit rating agencies have given the country positive credit ratings with stable economic outlooks. Moody's assigned a stable outlook of Baa2 (Stable) to the country as of June 2017, while Standard and Poor's maintained its rating to a stable outlook of BBB as of April 2017. Fitch affirmed the country's credit rating at BBB- with a positive outlook as of March 2017. This set the country's credit rating higher than the minimum investment grade status.[9]

1.2 Outline of PPP Procedures

Broadly, PPP projects in the Philippines pass through the following process from project formulation to project completion. It is categorized into four stages: development stage, approval stage, procurement stage, and implementation stage. The projects are formulated as pipeline projects at the development stage[10], and then are evaluated and appraised by the relevant government agencies and

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The consultant is chosen from a group of eligible advisory firms that are short listed in advance. http://ppp.gov.ph/wp-content/uploads/2014/01/Panel-of-Consulting-Firms_April2015.pdf

[7] The Infrascope is issued by Economist Intelligence Unit (EIU) within The Economist Group in the U.K.

[8] Aside from the Philippines, the ASEAN6 include Brunei Darussalam, Indonesia, Malaysia, Singapore and Thailand

[9] The credit rating represents the credit worthiness of corporate or government bonds. Moody's rating was released December 2014; Fitch released this rating last September 2015; and Standard and Poor's released their rating May 2014)

[10] During the project development stage, market sounding, where the public sector conducts opinion hearing/exchange with the private sector, is carried out aiming for smooth project implementation.

approved by ICC or the NEDA Board[11], the latter chaired by the President of the Philippines, at the approval stage. At the procurement stage, through a series of processes of competitive bidding, the project proponent is selected. At the implementation stage, the PPP agreement is reached and construction, operation, and maintenance activities are carried out. These stages are further detailed in the next figure.

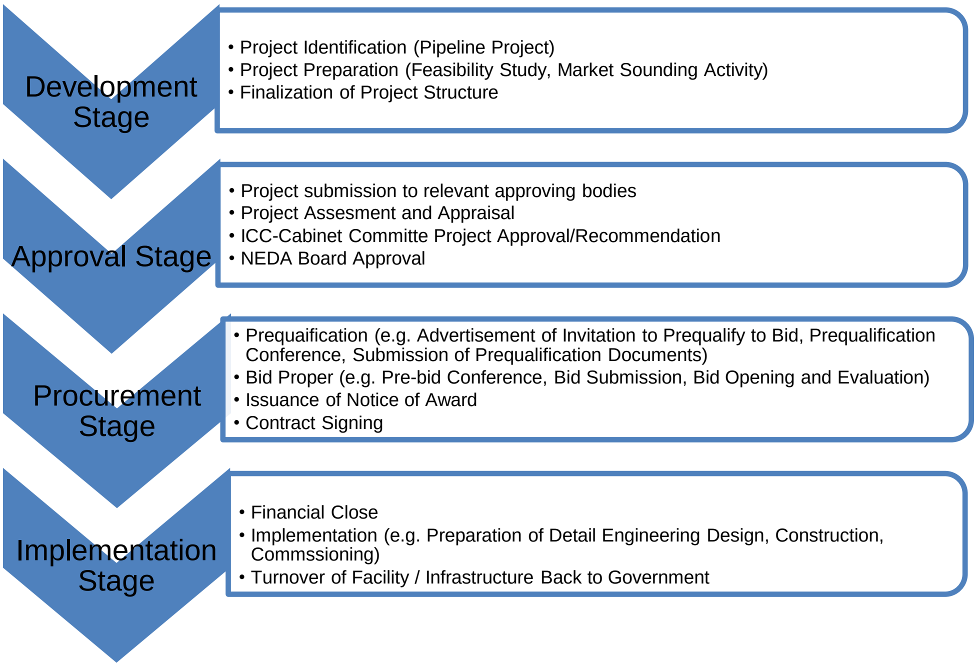

Figure 1: Outline of PPP Procedure

Source: PPPs@PH, Investment Opportunities

For the last few years, the PPP Governing Board has issued policy circulars on each procedure and related items to supplement the PPP Program's legal framework, with an aim to improve the PPP environment in the Philippines. This is from policy identification until monitoring process, and covers guidelines, best practices, financial mechanism, and people management.

Table 1 Overview of Relevant Policy Circulars issued by PPP GB

Year	#	Policy Circular	Description
	02-2015	Policy Circular on Pipeline Development	to institutionalize the criteria and process in the identification, selection, and prioritization of PPP projects using Multi-Criteria Analysis (MCA) approach
	03-2015	Policy Circular on PPP Best Practices	to institutionalize best practices in PPP procurement process and project implementation across the government and to guide the implementing agencies in effectively integrating these into the PPP procurement process and project implementation

11 Approval processes differ depending on the levels of the project (national / local, and project cost). For further details, please refer to Sec. 2.6 of BOT Law IRR (http://www.neda.gov.ph/wp-content/uploads/2013/12/BOT-Law-IRR-Amendments-2012.pdf)

	04-2015	Policy Circular on Viability Gap Funding (VGF)	to institutionalize a VGF scheme for PPP projects to make economically-viable PPP projects affordable to the public and at the same time, improve their commercial attractiveness
	05-2015	Policy Circular on Appointment of Probity Advisors for PPP Procurement	to institutionalize the appointment of Probity Advisors prior to the commencement of applicable PPP procurements to manage and provide an independent opinion on probity issues that may arise during the procurement process; and for confirming that the concluded process has met the probity requirements amended in 2016 and in 2017
	06-2015	Policy Circular on Termination Payment for PPP Projects	to set Termination Payment (TP) as a measure of risk-sharing arrangement TP: the amount payable by the Government or the Concessionaire on the occurrence of an event or series of events provided for in the PPP contract that results in the termination of said contract
	07-2015	Policy Circular on PPP Monitoring Framework and Monitoring Protocols	to identify the roles and responsibilities of the key parties involved in monitoring the implementation of PPP projects; to define the protocols for generating, processing, and sharing information for monitoring the implementation of PPP projects; and to document information on lessons learned and best practices during project implementation that can be used in planning, evaluating, and implementing future PPP projects
2016	08A-2016	Managing Government Employees Affected by PPP Projects	to set out a framework for managing government employees affected by PPP projects
	09A-2016	Assessing Value for Money in PPP Projects	to set Value for Money to attain the most cost-efficient way to deliver services to its citizen
	10-2016	Public Consultation and Engagement for PPP Projects	to institutionalize the consultation and engagement of the public, with the end view of improving transparency in the development and implementation of PPP projects
2017	05B-2017	Appointment of Probity Advisors for PPP Procurement	to appoint Probity Advisors for ensuring fair, impartial, transparent, and efficient PPP procurement process

1.3 Key Features in the PPP Infrastructure Market in the Philippines

◆ The Presence of Conglomerates in the PPP Market

One of the predominant features of the PPP market in the Philippines is the presence of local conglomerates. While 99.6% of the companies in the Philippines are small- and medium-sized enterprises, only approximately 0.4% of the companies have total assets of more than 100 million PhP (excluding land value) or have more than 200 employees. Within that small percentage of large-sized enterprises, the conglomerates have increased their presence in various sectors, including railways, roads, airports, water, health, education, etc., as shown in the table below. In doing so, they have diversified their risk and succeeded in becoming a force that cannot be ignored when doing business in the Philippines. Their presence in the PPP infrastructure market has also been large; among the 15 PPP projects[12] awarded since 2010, the conglomerates are involved in almost all of them, across various sectors.

Conglomerates oftentimes form a consortium (or a special purpose company) with other companies to bid for PPP projects, rather than bidding as a single party, depending on the scope of works and necessary expertise and resources. Given this, one plausible approach for foreign companies to enter the PPP infrastructure market is by seeking partnerships or venturing with conglomerates, involving both their financial resources as well as technical strengths.

Table 2 Overview of major Conglomerates in infrastructure development[13]

Conglomerates	Overview	PPP Sectors[14]
San Miguel Corporation	Conducts business in the beverage, alcohol, food, poultry, livestock feed, and aviation sectors. The group's 2013 sales account for 6.5% of the 2013 nominal GDP of the country[15].	Airport, Railway, Port, Water
SM Group	Owns one of the largest commercial banks in the Philippines, Banco De Oro (BDO), and operates the retail giant, the SM Group. It is expanding its overseas real estate business, such as through opening shopping malls in China. SM Group holds a partial share of Megawide Construction.	Airport, Railway, Education, Health
Ayala Corporation	Conducts business in real estate, financial services, telecommunications, insurance, food, etc. Develops condominiums and various large commercial facilities in the Metro Manila area.	Railway, Road, Water
JG Summit	Conducts retail, food, aviation, real estate, petroleum, textile, and telecommunication businesses.	Airport, Road
Aboitiz	Conducts electricity/power, construction, real estate, shipbuilding, financial services, food, and resort businesses.	Airport, Railway, Road
DM Consunji	Conducts business in the construction, electricity/power, water, and real estate sectors.	Railway, Road

[12] As of November 2017
[13] Although not a conglomerate, Metro Pacific Investments Corporation, with the parent company in Hong Kong, is a firm that has been active in the PPP infrastructure market, in sectors such as Railway, Toll Roads, Airports, Hospitals etc.
[14] Including sectors involved during pre-qualifications
[15] Institute of Developing Economics "Empirical analysis on investment and financing activities of Filipino companies" (2015) http://www.ide.go.jp/Japanese/Publish/Download/Report/2014/pdf/C31_ch2.pdf

Conglomerates	Overview	PPP Sectors[14]
Lopez Group	Conducts business in the telecommunications and infrastructure (power generation, real estate, expressway, and water) sectors. Owns the largest broadcast station, ABS-CBN.	Power[16]
GT Capital	Conducts business in the financial and insurance sectors, as well as real estate, power, and automobile sectors. Owns the Metropolitan Bank & Trust Company, the second largest commercial bank (by asset value) in the Philippines.	Airport

Source: PPP Center Website、JBIC "Investment Environment in the Philippines" (2013), and interviews with related parties

◆ Value-added business structure in PPP projects

Another feature of the PPP market in the Philippines, especially in the toll road and railway sectors, is that it involves a commercial real estate and development component as a value-added business. It is not uncommon that the objective of some of the conglomerates that bid for PPP projects is to achieve investment returns through their value-added businesses. Even if land development is not included in the scope, some bidders calculate the financial feasibility by including land development opportunities in the surrounding or nearby areas that would directly or indirectly be serviced by such projects. An example of a project where the private sector offered a premium payment of 11.00 billion PhP is the NAIA Expressway Project (Phase II)[17].

1.4 Financial Environment surrounding PPP

Three clusters – domestic private banks, foreign banks, and government banks – dominate the banking sector in the Philippines, which accounts for 90% of asset size of the sector. In terms of asset size and amount of deposits, top five banks such as Banco De Oro (BDO), Bank of the Philippine Islands (BPI), and the Metropolitan Bank and Trust Company are considered the largest domestic private banks in terms of capitalization. Many of the major banks are affiliated with the conglomerates or big businesses.

There are two relatively large universal government banks in Philippines[18]. The Development Bank of the Philippines (DBP) conducts operations such as middle- and long-term loans, which includes financing for infrastructure development, small and medium enterprise, and community development. The Land Bank of the Philippines (LandBank or LBP) on the other hand is another government-owned universal bank distinguished by its role as an institution providing credit assistance to farmers and fisherfolk, countryside lending, government fund depository functions as well as countryside infrastructure financing.

16 Privatization of the power plant of the National Power Corporation
17 http://www.dpwh.gov.ph/dpwh/PPP/projs/NAIA
18 Another universal government bank is the Al- Amanah Islamic Investment Bank of the Philippines.

In many cases, financing for ongoing PPP projects has been done within a single cooperation of companies or conglomerate, or through borrowing corporate finance by the project proponent. Banks can also make syndicated financing arrangements in the case of projects requiring substantially large financing.

The conglomerates tend to make three types of financial arrangements for project finance: (i) the project proponent self-finances the equity portion using its own existing profits/cash reserves (i.e., retained earnings); (ii) the project proponent finances the equity portion by issuing private placement bonds (i.e., stock offerings); and (iii) a bank affiliated with the conglomerate finances the debt portion of the project proponent. In the case of (iii) in which the financial transaction is limited within the conglomerate/group corporation, the Bangko Sentral ng Pilipinas (BSP) impose a Single Borrower's Limit[19] (lending by a bank is limited to twenty-five percent (25%) of the net worth of the bank in cases for which a group corporation is a borrower)[20].

Since financial liquidity is high in the banking sector in the Philippines, domestic private banks seek large-lot borrowers including those for viable PPP projects. Domestic private banks are able to extend 10 to 15 years (middle- to long-term) loans with lower interest rates. On the other hand, at present, there are concerns regarding the fulfillment of obligations by the implementing agencies. In order to eliminate such concerns, a framework has been considered under which the government guarantees performance obligations of the implementing agency. The Risk Management Programme assures that the government would have available resources in the event of the need to call for contingent liability claims. In such circumstances, the provision of limited recourse loans (i.e., project finance) is limited and is dependent on the specific conditions such as risk allocation or guarantees for projects.

In the Philippines, major domestic institutional investors are banks, public pension funds, and life insurance companies. The presence of investment trusts and insurance companies other than life insurance companies are still small, and majority of the investments are made in government bonds and stocks or commercial papers of large enterprises. In terms of infrastructure investment, a first-ever private equity fund focused on Philippine infrastructure projects including PPP projects, called Philippine Investment Alliance for Infrastructure (PINAI) fund was established in 2012, with participation by the Asian Development Bank, Philippines' state-owned pension fund, the Government Service Insurance System (GSIS), Dutch pension fund asset manager APG, and the Australian Macquarie Group. It has since financed projects such as wind power projects and solar thermal plants, and is active in capitalizing various infrastructure investment opportunities in the country.

As the PPP program gears up to roll-out and implement the large-scale PPP projects, the PPP Center is

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[19] Manual of Regulations for Banks (MORB), Sec. X303 Credit Exposure Limits to a Single Borrower http://www.bsp.gov.ph/downloads/regulations/morb/morb1.pdf

[20] If the lending is concentrated in one borrower group, irrecoverable risks are significant in case such a company within the group becomes bankrupt. Single borrowers limit aims for better risk management and avoidance of concentration of credit risk.

also exploring several mechanisms to tap capital markets as another financing option for PPP projects. As such, the PPP Center, together with Securities and Exchange Commission, Philippine Stock Exchange and Philippine Dealing System, is now at the early stages of developing the framework that will allow companies engaged in PPP projects to raise funds through equities and bond issuances.

1.5 General investment environment in the Philippines

◆ Restrictions of Foreign Investment

Article XII of the 1987 Philippine constitution set the groundwork in terms of restrictions in in foreign investments and ownership. The governing law on foreign investment in the Philippines is Republic Act No. 7042, or "The Foreign Investments Act of 1991." Under the law, Philippine nationals or corporations with Philippine nationality should have at least 60% ownership in an enterprise in defined investment areas reserved to them based on the Foreign Investment Negative List. However, the law also stipulates foreign nationals can have 100% ownership or foreign investments in export enterprises and domestic marker enterprises, activities of which are defined by law or do not fall under the Foreign Investment Negative List.

The Negative List is periodically amended as necessary. In the 10th Negative List[21] amended in October 2015, it restricted the activities of "operation and management of public utilities" and "acting as project proponent and facility operator of a build-operate-transfer project requiring a public utilities franchise" to 40% foreign equity. In other words, for PPP projects, which include operation and management of public utilities, 60% of the equity must be provided by a Filipino company registered with the Securities and Exchange Commission (SEC). The SEC in 2016 also approved the supplemental listing and disclosure rules for private partners of PPP infrastructure projects[22].

◆ Investment Incentive according to BOT Law

The following investment incentives will be made available to project proponents according to the Revised IRR (2012):

i) Project cost of more than 1.0 billion Pesos

Upon registration with the Board of Investments (BOI), project proponents can be entitled to incentives as provided for under Executive Order (EO) No. 226 (known as the Omnibus Investment Code of 1987[23])

ii) Project cost of 1.0 billion Pesos or less

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[21] 10th Negative List based on the Foreign Investment Law enforced in May 2015 under Executive Order (EO) No. 184 http://www.gov.ph/downloads/2015/05may/20150529-EO-0184-BSA.pdf

[22] See http://www.sec.gov.ph/wp-content/uploads/2015/10/SEC-Approved-PPP-Listing-Rules-November-08-2016.pdf for more details

[23] Major incentives provided under the Omnibus Investment Code are exemption of income tax from 4 years to 6 years. Please refer to the following URL for details :http://invest.cfo.gov.ph/pdf/part2/omnibus-investment-code-of-1987.pdf

Upon registration with the BOI, project proponents can take advantage of incentives provided for under the Omnibus Investment Code, subject to inclusion of the project activity or sector in the current Investment Priorities Plan (IPP) of the BOI[24].

iii) Projects can also be entitled to other specific incentives as provided under existing laws (e.g., incentives under Republic Act 7156, "Mini-Hydroelectric Power Incentives Act")

iv) Local Government Units may provide additional tax incentives, exemptions, or reliefs

v) The project proponent may obtain the required financing from foreign and/or domestic sources

vi) The Government may also provide the following direct or indirect support[25]:

a) Cost Sharing
b) Credit Enhancement
c) Direct Government Subsidy
d) Direct Government Equity
e) Performance Undertaking
f) Legal Assistance
g) Security Assistance

◆ Taxation

i) Outline

Taxation in the Philippines consists of mainly national tax and local tax:

a) National tax

- Fundamental Laws are "National Internal Revenue Code of 1997"[26] and "Tariff and Customs Code of the Philippines"[27]. As of November 2017, the Tax Reform for Acceleration and Inclusion (Train Law) is planned[28].
- There are cases that different treatment is applied according to presidential order

b) Local tax

- The "Local Government Code" Republic Act 7160 was issued in 1991, and local governments have the authority to collect taxes
- The Local Government Code is the basis of taxation for local taxes.

ii) Major National Tax

- Income Tax: 30% (exclusive of separate tax benefits or burdens); a 2% Minimum Corporate Income Tax (MCIT) which is imposed whenever such corporation (the fourth year onwards)

[24] PPPs are identified as one of the investment priority areas of the 2014-2016 IPP. For more details, see http://industry.gov.ph/investment-priorities-plan-ipp-2014-2016/. Note that the IPP is regularly revised depending on the economic development agenda of the country.
[25] Note that under Section 12.3 of the BOT Law IRR, any form of government support of distribution shall only be available for solicited projects
[26] For more details, see: http://www.bir.gov.ph/index.php/tax-code.html
[27] For more details, see: http://www.gov.ph/1957/06/22/republic-act-no-1937/
[28] The Tax Reform for Acceleration and Inclusion (Train Law) was approved on 19th December 2017 (Republic Act 10963)(https://www.bir.gov.ph/images/bir_files/internal_communications_1/TRAIN%20matters/RA-10963-RRD.pdf)

has zero or negative taxable income or whenever the amount of MCIT is greater than the normal income tax due.

- Personal Income Tax: 5%~32% of progressive taxation
- Estate and Donor’s Tax: Imposed on entities for transferring assets to another
- Value Add Tax (VAT): 12%
- Withholding Tax: three kinds (salary, expanded, final)
- Capital gains taxes: imposed on capital gains of assets (bonds, stocks)

iii) Major Local Tax

- Provincial tax: real estate transaction tax, publishing business tax, franchise tax, sediment tax
- Municipalities Tax: real property tax, business tax
- Public Utility Charges, a common revenue raising power among local government units relevant to PPPs.[29]
- Barangay tax: for issuance of clearances which are prerequisites for city or municipality permits

◆ Tax Treaties[30]

To avoid double-taxation, the government of Philippines has concluded tax treaties with 38 countries (as of March 2015). In the tax treaty between the Philippines and Japan, limited rates of taxation on investment income are as follows:

i) Dividends: 10% (if more than 10% of the entity is owned by the investor) or 15% (if less than 10% of the entity is owned by the investor)
ii) Interest: 10%
iii) Royalty: 10%-15%

◆ Form of Foreign Investment

Foreign Investors are allowed to participate in commercial activities in the Philippines in the form of the organizations listed below, according to “The Corporation Code of the Philippines"[31], “the Omnibus Investment Code”, and other regulations. When establishing a corporation in the Philippines, all entities are required to register at the Securities and Exchange Commission (SEC), Department of Trade and Industry[32] and Bureau of Internal Revenue (BIR).

[29] Under Sec 154, Article V of the Local Government Code, LGUs may fix the rates for the operation of public utilities owned, operated and maintained by them within their jurisdiction

30 It is important to note that the tax treatment differs depending on the nature or form of foreign investment (i.e. Regional or Area Headquarters (RHQ) are not subject to income taxes but Regional Operating Headquarters (ROHQ) shall have a tax of 10% of their taxable income.).

[31] For details, see: http://www.sec.gov.ph/wp-content/uploads/2015/08/Corporation_Code_of_the_Phils_Batas_Pambansa_68.pdf

[32] Registration with the DTI is required for sole proprietorships, not corporations

i) Incorporated entity

A corporation is a juridical entity established under the Corporation Code with a separate corporate status and liability that is distinct from that of its shareholders. The liability of the shareholders of a corporation is limited to the amount of their capital share.

ii) Branch

A branch is an entity of a foreign company that is established under the laws of its country, to carry out business activities of its head office. The branch is merely an extension office, which is managed under the responsibility of the parent company

iii) Representative Office

A representative office is an entity of a foreign company that is established under the laws of its country, and it does not derive income from business activities in the Philippines. A representative office is limited to the undertaking activities of its head office, such as information dissemination and promotion of the head office's products.

iv) Regional Headquarters (RHQ)

An RHQ is an administrative branch of a multinational company engaged in international trade, which is established under the laws other than the Philippines. It serves as a supervisory, communication and coordinating center for subsidiaries, affiliates and branches in the Asia-Pacific region and other foreign markets. It does not derive any income from Filipino sources.

v) Regional Operating Headquarters: (ROHQ)

An ROHQ is a foreign business entity (a form of branch) to carry out qualifying services to its affiliates, subsidiaries or branches in the Asia-pacific region. Its activities are limited (general administration and planning; business planning and coordination; logistics services)

2. Useful information for the private sector on participating PPP projects, and its latest developments

2.1 Government Support

(1) Viability Gap Funding (VGF)

◆ Purpose of the VGF

Viability Gap Funding (VGF) is a form of financial support given by the implementing agency for solicited[33] concession-based PPP projects that are economically viable but are not commercially feasible. VGF is sourced from the General Appropriations Act (GAA), and allocated annually by the Department of Budget and Management (DBM) to the implementing agencies.

◆ Status of Institutionalization of VGF

The BOT Law and Revised IRR (2012)[34] stipulate "Cost Sharing" as one of the forms of government support. In order to define the purpose, scope, and applicability of VGF, the Public-Private Partnership Governing Board Policy Circular No. 01A-2016[35] institutionalized VGF as financial support to capital expenditures of PPP projects in improving commercial attractiveness.

◆ Main Features in the Application of VGF

i) Applicability of VGF

VGFs shall be available only to solicited[36] concession-based PPP projects which have been evaluated as economically viable but are not financially attractive without such support. "Concession-based PPP projects" refers to PPP projects where the implementing agency grants the project proponent the right to finance, design, build, operate, and maintain an infrastructure facility, and recover its investment and operating and financing costs by charging a public user fee or tariff.

ii) Form of the VGF

VGF shall be applied in the form of a cash subsidy made available to the private sector as a contribution of the government to the project.

iii) Scope of VGF

- "Cost sharing" shall not exceed fifty percent (50%) of the project cost, and it shall bear a portion of capital expenses such as: any partial financing of the project, provision of right-of-way, transfer of ownership of the building, and others[37].

◆ Policy for Government Support

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[33] Direct government subsidies, equities and guarantees cannot be granted to unsolicited projects.
[34] http://ppp.gov.ph/wp-content/uploads/2015/01/BOT-IRR-2012_FINAL.pdf
[35] http://ppp.gov.ph/wp-content/uploads/2015/04/PPP-Governing-Board-Policy-Circular-No-04-2015.pdf
[36] Direct government subsidies, equities and guarantees cannot be granted to unsolicited projects.
[37] Policy Circular No. 04-2015 states that the maximum VGF support shall be applied in accordance to the existing laws. The BOT Law and Revised IRR (2012) indicate its specific framework

Key principles for government support, including VGF, are as follows:

- Government support shall be given to PPP projects that have economic value, but are not bankable by itself.
- Government support shall be minimized by evaluating the contingent liability risk, estimating its real cost to the national budget, and formulating a management system to monitor the risk.
- Provision of government support should be made in a transparent manner.

◆ Process of VGF application by the Government of the Philippines

As for projects that apply for a VGF, the validity of the VGF is reviewed as part of the PPP appraisal process.

i) Project preparation stage

The implementing agency shall conduct a feasibility study, review whether VGF ought to be applied or otherwise, and if applicable, propose the maximum amount and indicative disbursement schedule of the VGF.

ii) Project appraisal stage

Project appraisal is done by the ICC Technical Board (ICC-TB). Representatives from the DOF is responsible for the financial appraisal and shall review the maximum amount of the VGF and its impact on the fiscal sustainability through the validity assessment of the VGF.

iii) Project approval/recommendation

ICC-Cabinet Committee shall review the proposed projects including the validity of VGF, and provide approval and recommendation.

iv) NEDA Board approval

NEDA Board approves the proposed project, including the maximum amount of VGF.

◆ Selection of the project proponent for PPP projects with VGF

The financial proposal is the final determining factor to select the winning bidder. For projects where VGF is applied, the amount of VGF is the only parameter in the financial evaluation, where the lowest VGF or the highest premium[38] becomes the winning bid.

(2) Right-of-Way

The BOT Law and Revised IRR (2012) stipulate that the government may provide financial support in the form of “Cost Sharing" through the provision of a right-of-way.

◆ Responsible party for land acquisition

In principle, the government is responsible for land acquisition and procedural works. Acquisition of a

[38] ”highest premium” essentially indicates a negative VGF wherein a bidder, instead of asking for a VGF would provide a premium for the government as apart of its bid package. Note however that there has been a more recent policy change that defer from using VGF or premium payment as a bid parameter

right-of-way for PPP projects shall be carried out pursuant to the Republic Act No.10752[39], "The Act to Facilitate the Acquisition of Right-of-Way, Site or Location for National Government Infrastructure Projects and for Other Purposes"[40].

◆ Considerations

- In case of a proposal that is different from the original alignment of right-of-way is made by the private proponent, an exceptional arrangement shall be considered by the government subject to the merits of the alternative alignment being put forward. While the government basically is responsible for land acquisition, both parties are required to split the cost.
- The Land Acquisition and Resettlement Action Plan (LARAP) and ROW Acquisition Timeline for the project should be established first to avoid or minimize any delays and to mitigate any issues arising during the ROW acquisition period.
- According to the Revisions on the ICC Guidelines and Procedures, ICC and NEDA Board approval is needed for a proposed project that incurs a 10 percent increase in the total cost arising from the variation[41].
- The timing of the transfer of the right-of-way to the project proponent depends per project, and will be discussed through individual consultations.
- In case of delay in the completion of the works due to a delay of land acquisition by the government, compensation may be made in the form of either liquidated damage or extension of the concession period as agreed by the parties.
- For the unsolicited projects, the government shall not provide any direct government support and guarantees, including provision of right-of-way[42].

  However, the government may carry out the land acquisition for the right-of-way based on a premise that it will rent out the land and receive a lease payment from the project proponent[43]

(3) Direct Government Subsidy

◆ Purpose of Direct Government Subsidy

Direct Government Subsidy refers to an arrangement where the government and respective governmental agencies bear a portion of the project cost or operating and maintaining costs. Other than bearing of cost, the government may contribute assets to the project, waive or grant special rates on real property taxes, waive charges or fees in regard to business permits or licenses.

◆ Status of institutionalization of Direct Government Subsidy

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[39] http://www.officialgazette.gov.ph/downloads/2016/03mar/20160307-RA-10752-BSA.pdf
[40] http://ppp.gov.ph/wp-content/uploads/2015/01/Republic-Act-8974.pdf
[41] "Variation" in this case should be in accordance with the BOT Law IRR Section 12.11 (Contract Variation). Furthermore, if the variation is proposed by the government, the government shall bear all costs associated therewith, subject to the approval of the relevant Approving Body.
[42] Note however, that under the BOT Law IRR Section 10.4, the grant of usufruct of government assets, including among others, right-of-way, to project proponents shall be considered as direct subsidy or equity unless government receives appropriate compensation pursuant to existing laws, rules and regulations, and guidelines.
[43] Such was the case of the NLEX-SLEX Connector Road Project, located in central Manila).

The BOT Law and Revised IRR (2012), Section 13.3.d stipulates that the government may provide “Direct Government Subsidy".

2.2 Government Guarantee

The Government of the Philippines has been promoting institutional reform to strengthen government guarantee schemes, and has developed a series of new schemes. While the government guarantee scheme in the Philippines is not designed to separately classify “direct liability” and “contingent liability”, this chapter explains the government guarantee according to the said classification.

2.2.1 Guarantee for Direct Liability

◆ Purpose of guarantee for direct liability

Guarantee for direct liability refers to guarantees made by the Department of Finance, Government of the Philippines for liabilities that arise when the implementing agency defaults on its financial obligation that is contractually defined and agreed in the PPP agreement. The purpose of guarantee for direct liability is to enhance the credibility of implementing agencies in fulfilling their obligations.

◆ Status of institutionalization of guarantee for direct liability

The BOT Law and Revised IRR (2012), Section 13.3.e stipulates “Performance Undertaking”, where the government may take the responsibility for the performance of the implementing agency’s obligation under the contractual arrangement.

◆ Policy for guarantee for direct liability

Guarantee for direct liability shall be available only to solicited projects, and will be applied when necessary.

◆ Procedures for guarantee for direct liability

The relevant laws and regulations do not stipulate a standard procedure on guarantees for direct liability. A typical procedure that has been applied for an existing PPP agreement is as follows;

- Secretary of Finance on behalf of the Republic of the Philippines issues ”Undertaking Letter of the Republic” to the project proponent. This document is attached to the PPP agreement, and will come into effect whenever necessary.
- ”Undertaking Letter of the Republic” states that the Republic, as primary obligator and not merely as surety, guarantees the payment of amounts for which the implementing agency may become liable.

2.2.2 Guarantee for Contingent Liability

◆ Purpose of guarantee for contingent liability

Guarantee for contingent liability intends that, in case some defined event and/or risks under a PPP agreement occurs, the government guarantees the liability incurred by the implementing agency, if the implementing agency cannot fulfill said obligation.

◆ Status of institutionalization of guarantee for contingent liability

The BOT Law and Revised IRR (2012), Section 13.3.b stipulate "Credit Enhancement", where the government may guarantee the performance or obligation of which is contingent upon the occurrence of certain events and/or risks as stated in the PPP agreement. In March 2015, the Public-Private Partnership Governing Board Policy Circular 06-2015[44] was issued, which covered "Termination Payment".

Institutionalization of these mechanisms is expected to give confidence to the private sector and encourage their participation in the PPP projects. In particular, the establishment of the Contingent Liability Fund is expected to reduce the risk of default on the contracting agencies in terms of payment of liabilities that are contingent. On the other hand, the challenge regarding the Contingent Liabilities Fund is that it is only intended to guarantee the contingent liabilities, and does not cover direct liabilities (firm commitments).

◆ Policy for guarantee for Contingent Liability[45]

- Guarantee for contingent liability shall be available to solicited projects. Unsolicited Projects may also incur contingent liabilities if the government does not comply with its contractual obligations.
- Implementation of guarantee for contingent liability is subject to appropriate risk-sharing, based on the principles set in Generic Preferred Risk Allocation Matrix (GPRAM)[46]. Risks are allocated to the party that could best manage and assume the consequences of the risks involved.
- The relevant laws and regulations do not explicitly state risks that should be guaranteed. The risks guaranteed shall be particular events and risks that are stated in the PPP agreement.
- In principle, the private project proponent shall take the commercial risks.
- Generic Preferred Risk Allocation Matrix (GPRAM) is a guideline that sets the principle of risk allocation between the public sector and the private sector, with its risk matrix describing the preferred risk allocation parties, possible risk mitigation strategies, suggested contract provisions and so on. It lists ten major risks (construction risk, financial risk, operational risk, demand risk, legislative and government policy risk, force majeure risk, etc.), and covers typical risks that may occur in PPP projects.

(1) Termination Payment

◆ Purpose of Termination Payment

The Termination Payment clause is applied in order to establish a compensation scheme for the project

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[44] https://ppp.gov.ph/wp-content/uploads/2015/08/PPP-Governing-Board-Policy-Circular-No-06-2015.pdf
[45] Unsolicited Projects may also incur contingent liabilities if the government does not comply with its contractual obligations.
[46] https://ppp.gov.ph/wp-content/uploads/2017/02/GPRAM_2Aug2016.pdf

proponent and the government, resulting from the termination of the PPP agreement. Causes of termination include implementing agency's default, project proponent's default, and force majeure. Securing compensation due to the termination of the PPP agreement shall reduce uncertainty of liabilities caused by termination, giving confidence to all the key stakeholders involved in the project, including lenders.

◆ Status of institutionalization of Termination Payment

Termination Payment has been institutionalized by the Public-Private Partnership Governing Board Policy Circular No. 06-2015 issued on 25 March 2015[47], stating that all PPP agreements shall contain mandatory terms of compensation related to contract termination.

◆ Termination Events

The specific events that may lead to a termination shall be determined on a per project basis, which is stipulated in the PPP agreement. Events on which termination payments are applied include, but are not limited to, the following:

- Failure of the project proponent or the implementing agency to satisfy the conditions precedent under the contract (e.g., delay of provision of right-of-way)
- Occurrence of a force majeure event, the effects of which is prolonged or not remediable
- Abandonment of works by project proponent
- Violation of any laws, rules, or regulations of the Republic of the Philippines
- When the project proponent assigns, transfers, or otherwise disposes any of the rights under the PPP agreement without the consent of the implementing agency
- Insolvency
- Poor performance of the project proponent or persistent breach of its obligation under the PPP agreement
- A Material Adverse Government Action (MAGA) event occurs where the parties are unable to agree to a MAGA compensation
- Default of the government as defined in the PPP agreement
- When banks or lenders determines that the project proponent has defaulted

◆ Principle of Termination Payment Calculation

- In the case of government default: the government shall pay the outstanding senior debt, subject to applicable government-mandated caps, incurred by the project proponent, and shall allow the latter to realize a reasonable rate of return, as may be allowed under the law.
- In case of project proponent default: the government shall pay the project proponent as much as the outstanding senior debt used to fund the core asset(s), subject to applicable caps, at the time of termination and as may be allowed under the law.

[47] http://ppp.gov.ph/wp-content/uploads/2015/08/PPP-Governing-Board-Policy-Circular-No-06-2015.pdf

- In case of termination due to force majeure: the government shall pay either the depreciated book value of the assets or value of the assets appraised at their damaged condition, at the time of termination. Costs of restoring the assets to its condition prior to occurrence of the force majeure event may be shared with the project proponent.

◆ Procedures of payment for Termination Payment

- Although Public-Private Partnership Governing Board Policy Circular No. 06-2015 and other relevant laws do not state a concrete procedure of Termination Payment, the typical process applied for an existing PPP agreement is as follows.
- Upon receipt of the Notice of Termination, the implementing agency and the project proponent shall meet to determine an amount of Termination Payment. If the parties cannot agree on the amount of the Termination Agreement, the matter may be referred to an Independent Expert by either party. Some Concession Agreements also provide for Finance Parties' Step-in Rights in the case of Concessionaire's Event of Default such that the Finance Parties or a party nominated by them shall become entitled to cure the Concessionaire Event of Default.
- In most cases, the formula of Termination Payment is stated in the PPP agreement. Termination Payment shall be computed based on the value as of Termination Date. Settlement amounts such as liquidated damages can be included in the calculation of Termination Payment.
- Upon determination of the Termination Payment, the DBM allocates the budget to the implementing agency, and the implementing agency makes the payment to the project proponent. Termination Payment will be made in Philippine Pesos, which may be paid outright in cash, deposited in the bank account designated by the project proponent, or through issuance of a promissory note from the Republic of the Philippines through the DOF.

(2) Material Adverse Government Action

◆ The purpose of MAGA

Material Adverse Government Action (MAGA) is defined as all actions taken by the national agency which has a material adverse effect on rights and obligations of the project proponent, such as rights, privileges, enjoyment and/or exercise, under the PPP agreement. Specifically, this includes a change in law, discriminatory imposition of any new national or local tax, or changes in the maximum rate of any national or local tax. MAGA is intended for the government to guarantee compensation in consequence of material adverse government actions.

(3) Contingent Liability Fund: CLF

◆ Purpose of Contingent Liability Fund

A Contingent Liability Fund (CLF) is established by pooling a common fund that the government could utilize in providing compensations for contingent liabilities stated in the PPP agreement, in case the implementing agency defaults. The presence of a CLF enhances payment credibility of the government.

◆ Significance

Establishment of a CLF has great significance, as the fund enables making timely payment to the project proponent to comply with obligations imposed on the implementing agency, without the need of approval by the congress. Moreover, by establishing the fund as an official guarantee fund, it is able to widely cover risks.

◆ Status of institutionalization of Contingent Liability Fund

The new PPP act currently in discussion includes the provision to institutionalize the Contingent Liability Fund. Amendment of the annual General Appropriations Act (GAA)[48] in association with establishment with Contingent Liability Fund is also being considered. The Contingent Liability Fund is likely to be established under the National Treasury. Currently, as a precursor of a Contingent Liability Fund, an un-programmed Risk Management Fund has been created, and has a pooled budget of PhP 29 billion.

The Development Budget Coordinating Council (DBCC) created the Technical Working Group on Contingent Liabilities to:

- Monitor the CLs arising from contractual obligations of the IAs;
- Recommend the amount of the Risk Management Programme (RMP);
- Be responsible for issuing Implementing Rules and Regulations necessary for the IAs to access the RMP;
- Issue semestral and annual reports on the status of implementation of PPP Projects and the CLs arising for the PPP Project to the DBCC; and
- Recommend to the DBCC the appropriate action to mitigate and avoid the recurrence of realized obligation

It is envisaged that the Contingent Liability Fund will cover risks allocated to the government, such as regulatory risks, failure to acquire right-of-way, failure to adjust tariffs, as well as to cover termination events and force majeure scenarios.

2.3 Letter of Commitment (LOC)[49]

◆ Purpose of the LOC

Implementation of PPP projects where multi-year payments from the implementing agency to the project proponent (e.g., Availability Payments, payment for Independent Consultant, Viability Gap

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[48] In the GAA of 2017, Unprogrammed Appropriations, PhP 29.00 Billion was appropriated to the government's Risk Management Program to cover commitments made by, and obligation of, the National Government in the agreements covering Public-Private Partnership (PPP) projects.

[49] For more details, see the National Budget Circular No. 564 dated June 8 2016. An online version can be viewed through: http://www.dbm.gov.ph/wp-content/uploads/Issuances/2016/National%20Budget%20Circular/NBCNo564_GUIDELINES%20FOR%20ISSUANCE%20OF%20LETTER%20OF%20COMMITMENT%20(LOC).pdf

Funding, etc.) is necessary, the government must secure the budget for multi-year payment. The Letter of Commitment or LOC is a document issued by DBM, addressed to the implementing agencies, to cover budgetary support for Philippine Government obligations under PPP projects approved by the NEDA Board. Since the amount of needed budgetary support by the National Government cannot be ascertained prior to the bidding of PPP Projects, the amounts to be indicated in the LOC will only be determined based on the outcome of the procurement process, specifically after financial evaluations. In cases where no government support is needed, LOCs are not required by default.

◆ Status of institutionalization of the LOC

The Department of Budget and Management issued the National Budget Circular No. 564 on June 8, 2016 with the subject heading: Guidelines for Issuance of Letter of Commitment (LOC) Covering National Government Support for Multi-year Solicited Public –Private Partnership (PPP) Projects. In effect, the new policy carved out a distinct set of guidelines for multiple year budgetary cover for solicited PPP projects in the country.

◆ Consideration

- It is important to note that the Philippine Government appropriates funds annually through an act of Congress. While LOC issuance does not technically guarantee budgetary allocations every year, it serves as a certification that certain budgetary responsibilities for solicited PPP projects approved by the NEDA Board shall be included in the long term program of the Philippine Government based on the PPP contract to be signed with the private sector.
- Coverage of the LOC includes the following:

  Availability Payments – government payment to the private partner for delivery of projects in accordance with the PPP Contract. Such payments are paid periodically (monthly, quarterly, annually or depending on the set milestones in the PPP contract).

  Viability Gap Funding – government contributions made to assure financial viability of PPP projects or to assist the private partner in shouldering a portion of the project cost

  Real Property Tax – a type of tax levied by local government units on real properties which are to be assumed by the government as stipulated in a PPP Contract

  Right-of Way Acquisition and other related expenses – expenses related to the acquisition of real property needed for a PPP project through donation, negotiated sale, expropriation or any other mode of acquisition as provided by law including relocation and resettlement costs

  Funding for Independent Consultant – compensation for a person or entity appointed to render independent technical advice to the government and private sector parties, as well as to perform other services specifically defined in the PPP contract

Funding for Project Management Office – a unit in an implementing agency for the coordination and monitoring of projects.

- Implementing Agencies are required to submit the request for the issuance of the LOC to the DBM within ten (10) calendar days after the financial evaluation of the bids for the PPP project is completed. Along with the formal request, the implementing agencies are also required to submit supporting documents such as: (1) copy of the NEDA Board Resolution approving the PPP project, (2) Joint Certification by the DOF and the PPP Center on the list of obligations and corresponding amounts committed by the National Government for the PPP Project being requested for LOC issuance, (3) Agency Budget Strategy for the National Government obligations in the PPP project and (4) Agency Summary of the PPP project term sheet containing its technical, economic, financial, social and environmental appraisal aspects.

2.4 Unsolicited Proposal

◆ Status of institutionalization of Unsolicited Proposal

Unsolicited proposals are institutionalized in the BOT Law and Revised IRR (2012), which stipulate the process of unsolicited proposals and investment incentives for the project proponent. The underlying principle in accepting unsolicited PPP proposals is that the government understands that economically viable projects may also come from the private sector and can be considered subject to legal, technical, and financial viability of proposed initiatives.

◆ Requisites for Unsolicited Proposal

Unsolicited Proposals may be accepted on a negotiated basis, provided that all the following conditions are met.

- The project involves a new concept and/or technology, as determined by the implementing agency, and/or is not included in the list of priority projects of the agency.
- No direct government guarantee, subsidy, or equity is required.
- The implementing agency shall publish a call for comparative proposals for three consecutive weeks in a newspaper of general circulation, and no other proposal is received within sixty (60) working days.

◆ Projects ineligible for Unsolicited Proposals

Projects included in the "List of Priority Projects" as defined in Section 2.3 of the BOT Law and Revised IRR (2012) shall not be eligible to be accepted as unsolicited proposals unless involving a new concept or technology. In addition, any component of an approved project in the list of priority project shall not be eligible for unsolicited proposals.

◆ Incentives for Unsolicited Proposal

Direct government guarantee, subsidy, or equity shall not be applicable for unsolicited proposals. The grant of usufruct of government assets, including right-of-way, to the project proponent shall be considered as direct subsidy or equity unless government receives appropriate compensation. Other incentives stipulated in Rule 13 of the BOT Law and Revised IRR (2012), such as investment incentives and government assistance, may be granted for unsolicited proposals (refer to Chapter 1.4).

◆ Invitation for comparative proposals (Swiss Challenge)

The unsolicited proposal scheme in the Philippines does not simply apply direct appointment. After negotiations of the different parameters of the project, the IA will have to report the results to the said negotiations to the ICC. In order to secure competiveness and transparency, calls for comparative proposals from bidders other than the original proponent are advertised and evaluated. The project is then awarded to the superior proponent (the so-called "Swiss Challenge"). During the evaluation, the original proponent is given the right to match the comparative proponent's price proposal, and the original proponent will be awarded the project if it can match the comparative proposal.

The comparative proposal shall be submitted within a period of sixty (60) working days, calculated from the date of issuance of the invitation. Beyond that deadline, no proposals shall be accepted.

2.5 Alternative Dispute Resolution

◆ Status of institutionalization of Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) refers to procedures for settling disputes by means other than litigation (e.g., by arbitration, mediation, or mini-trials). Such procedures are usually less costly and more expeditious than litigation. While a general ADR mechanism itself has already been established in the Philippines, Executive Order by the President of the Philippines No. 78 has been issued in 2012[50], mandating the inclusion of provisions on the use of ADR mechanism in all contracts involving PPP projects, in order to ease dispute resolutions. On May 12, 2017, the Implementing Rules and Regulations (IRR) for Executive Order No 78 was published by the National Economic and Development Authority

◆ Outlines of ADR

Executive Order by the President of the Philippines No. 78 in 2012 does not confine the method of dispute resolution, and the Executive Order encourages using alternative modes such as mediation, arbitration, mediation-arbitration, early neutral evaluation, and mini-trial, or a combination of the

[50] http://ppp.gov.ph/wp-content/uploads/2015/03/EO-78-s-2012-ADR-Mechanisms-in-PPP-BOT-Contracts-and-JV-Agreements.pdf

above.[51]

As there are a variety of legal and contractual relationships in each PPP agreement, the most appropriate method shall be applied from different possible methods, depending on the type of disputes as well as the parties involved. Contracting parties may choose either the ADR mechanism in the Philippines or the international ADR mechanism. In addition, they are given complete freedom to choose the venue and seat governing their dispute, as well as the rules or procedures to be followed in resolving the dispute (If both parties agree, it is possible to choose a third country instead of their home countries according to arbitration rules and regulations of International Chamber of Commerce and London Court of International Arbitration).

[51] The freedom to choose the venue of dispute resolution is unequivocally provided in the contract, otherwise, the Rules of Court shall govern

2.6 PPP Modalities

PPP modalities in the Philippines, shown in the table below, are stipulated in the amended BOT Law SEC.2 and IRR Section 1.3.f. It is also stated in the law that other modalities that are not included may be adopted by obtaining approval from the President of the Philippines.

Table 3 PPP Modalities based on the BOT Law[52]

PPP Modalities	Role of the Private Sector	Fee Collection	Legal Title to Facilities	Others
Build-Operate-and Transfer (BOT)	Financing, construction of an infrastructure facility, and O&M over a fixed term	Based on the BOT contract. Tolls, fees, rentals, and charges are collected from facility users	During the operation period, facility belongs to the project proponent. At the end of the fixed term, facility is transferred to the government	Maximum fixed term is 50 years
Build-and-Transfer (BT)	Financing and construction of an infrastructure or development facility	Based on an agreed payment schedule, the total investments expended on the project with a reasonable rate of return will be received	After construction is completed, turned over to the government	
Build-Own-and -Operate (BOO)	Financing, construction, ownership, O&M of an infrastructure or development facility. The project proponent may assign O&M to a facility operator	Tolls, fees, rentals or other charges are collected from facility users to recover its total investment, O&M costs plus a reasonable return	Ownership is retained by the project proponent	Upon NEDA-ICC's recommendation, President's approval is required
Build-Lease-and -Transfer (BLT)	Financing and construction of an infrastructure or development facility, and leasing to the government	Based on an agreed schedule, lease payments are received	Automatically transferred to the government after the lease period	Similar to "Lease-to-Own" modality
Build-Transfer-and-Operate (BTO)	Financing and construction of an infrastructure facility on a turn-key basis.	Based on the BTO contract	Title is transferred to the government once the facility is commissioned	For the project proponent to avoid cost increase due to

[52] Although the BOT Law provides various modalities, majority of PPP projects are planned and implemented through BOT, BT and BTO modalities.

PPP Modalities	Role of the Private Sector	Fee Collection	Legal Title to Facilities	Others
	Operation by the project proponent once the title of the facility is transferred to the government.			tax imposed on land and assets, BTO modality is utilized for some projects instead of BOT in recent projects.
Contract-Add-and -Operate (CAO)	Additional construction to an existing infrastructure facility which it is renting from the government	Based on the CAO contract. Under agreed terms and schedule, rental payment will be made to the government	Transfer arrangement is depended upon the contract. The facility is transferred to the government upon completion of the lease	
Develop-Operate-and-Transfer (DOT)	Construction and operation of a new infrastructure, inclusive of development of adjoining property	Fee collection based on the DOT contract and benefits from higher property or rent values etc.	Transfer of property and facility to the government at the end of the contract period	Aside from the development of adjoining property, similar to BOT
Rehabilitate-Operate-and-Transfer (ROT)	Refurbishment and O&M of existing facility	Based on the ROT contract	Legal title to the facility is turned over to the government at expiry of franchise period	
Rehabilitate-Own-and-Operate (ROO)	Refurbishment, O&M of existing facility. Unless the operator is in violation of its franchise, it can continue to operate the facility in perpetuity	Based on the ROO contract. The government has an option to share income with the project proponent.	No time limitation imposed on ownership	

Source: BOT Law

2.7 PPP Related Government Agencies

There are several government agencies involved in PPPs in the Philippines. In addition, there are several inter-agency bodies such as the NEDA Board and ICC whose approval is needed to proceed to procurement. Another agency involved is the DBM which issues Letters of Commitment (LOC) for multi-year PPP projects which serves as a guarantee that public funds will be set aside for the compensation of private proponents if agreed upon by the parties. The contracting agencies include national government agencies and local government units (provincial governments, cities, and municipalities). These contracting agencies are responsible in developing PPP projects and conducting feasibility studies, procurement, monitoring, etc. The table below shows the names and functions of the related agencies and committees as well as the implementing agencies.

IAs are likewise integral organizations being the parties to contract private proponents and owners of PPP projects. Agencies such as DPWH, DOH, DOTr, LGUs and even State Universities and Colleges (SUCs) are identified as implementing agencies of PPP projects.

Table 4 Functions of the PPP Related Government Agencies and Implementing Agencies

Related Agencies and Committees	Functions
National Economic and Development Authority (NEDA)	• Manages the consistency between the Philippine Development Plan and PPP projects. NEDA Board is the approving body for projects costing more than PhP 300 million
PPP Center	• Formerly the BOT Center; reorganized and renamed in 2010, in accordance with Executive Order No. 8 (Amended as Executive Order No. 136, s. 2013) • Conducts strengthening of PPP framework (facilitation and assistance to implementing agencies, enhancement of its capacity development, and coordination amongst departments), implementing and promoting PPP projects, establishing and managing a central database system, etc. • Reports to the PPP Governing Board; also reports to NEDA for budgetary and administrative purposes • Acts as a facilitator of the PPP program and secretariat of two interagency committees, the PDMF and the PPP Governing Board (PPPGB)
PPP Governing Board (PPPGB)	• Overall policy making body for PPP, responsible for setting the strategic direction of the PPP Program and creating an enabling policy and institutional environment for PPP • PPPGB consists of the Secretary of Socio-Economic Planning as chairperson; Secretary of Finance as vice-chairperson; and the Executive Secretary, Secretaries of Budget and Management, Justice, Trade and Industry, and private sector co-chairman of the National Competitiveness Council, as members • PPP Center acts as the Secretariat to the PPP Governing Board
Project Development and Monitoring Facility (PDMF) Committee	• Responsible for approving applications for PDMF (Government's revolving fund that supports the pre-F/S, F/S, bidding document preparations, bid evaluation support, etc.), submitted by implementing agencies • Subject to the approval of the PPPGB, the PDMF Committee formulates, prescribes and recommends policies, procedures and guidelines for the use of PDMF and recovery of costs • PDMF Committee consists of representatives from NEDA (chair), DOF, and DBM.

Related Agencies and Committees	Functions
	• The PPP Center serves as the secretariat and is represented in the Committee as member
Department of Finance (DOF)	• Conducts financial and risk evaluations and government guarantee of PPP projects during project appraisal and approval • For solicited proposals, after the completion of the final selection of the project proponent, informal consent from the DOF may need to be secured • Issues an opinion on the draft contract within 10 days upon receipt of the draft contract as submitted by the Agency/LGU
Department of Budget and Management (DBM)	• Prepares national budget proposals and responsible for budget allocation of PPP projects • Approval of the agency is required in the issuance of Letter of Commitment as requested by implementing agencies
Investment Coordination Committee (ICC)	• An inter-agency committee under NEDA that sets PPP policies and principles. • It approves local projects costing more than PhP 200 million and national projects costing up to PhP 300 million. For projects costing more than PhP 300 million, recommendation is made to the NEDA Board by the ICC. While negotiated projects shall be submitted to the NEDA Board for approval upon recommendation by the ICC, regardless of amount • The ICC Cabinet Committee consists of the Secretary of Finance as chair; the Secretary of Socio-Economic and Development Planning as vice chair, and the Executive Secretary, Cabinet Secretary, Secretary of budget and Management, Secretary of Energy, Secretary of Trade and Industry, and the Governor of the BSP as members. • Evaluates the fiscal, monetary and balance of payments implications of major national projects, and recommends to the President the timetable of their implementation on a regular basis; Advises the President on matters related to the domestic and foreign borrowings program; and Submits a status of the fiscal, monetary and balance of payments implications of major national projects.
Office of the Government Corporate Counsel (OGCC) / Office of the Solicitor-General (OSG)	• Attached agencies of Department of Justice • Issues opinions on the draft contract for PPP projects to be implemented by National Government Agency or LGU (for OSG) and Government Owned and Controlled Corporations (for OGCC). Such opinions are issued by the respective offices prior to approval of the draft contract by the head of agency or LGU.
Department of	• Contracting agency for PPP projects for the transportation sector, including road, IT

Related Agencies and Committees	Functions
Transportation (DOTr)	transport, railways and airports, and for the maritime sector. • Established the Project Development Team (PDT), directly supervised by the sector specific Undersecretaries and responsible for project development to bidding preparation directly with the DOTr Primary Bids and Awards Committee
Department of Public Works and Highways (DPWH)	• Contracting agency for PPP projects for toll roads and others • Established the Public-Private Partnership Service, responsible for the project planning, implementation, and O&M management • In 2013, the DPWH Review Committee and Technical Working Group were created, that includes NEDA and PPP Center employees and supports the works of Public-Private Partnership Service • In the water and sewerage sector, it conducts development and implementation of local water projects and provides technical assistance.
Department of Health (DOH)	• Contracting agency that is developing PPP projects concerning modernization of hospitals and facilities, construction of new medical facilities, and installation of equipment • PhilHealth, a government owned and controlled corporation is under its authority
Department of Energy (DOE)	• Responsible for policy making and planning of the energy sector • The energy sector has been deregulated for more than 10 years and has entered into contracts with Independent Power Producers (IPPs), utilizing the BOT method • A few government-owned and controlled corporations, such as the Philippine National Oil Company (PNOC), are under its authority.
Metropolitan Waterworks and Sewerage (MWSS)	• Public utility for ensuring proper O&M for its water and sewerage sector in the Metro Manila region. • Contractor regulator for agreements with Maynilad (manages the western region of Metro Manila) and Manila Water (manages the eastern region of Metro Manila); concessionaries provide water supply services and MWSS regulates their operations including review and approval of tariff.
Local Government Units (LGUs)	• Provincial governments, city, and municipalities are considered contracting agencies for local projects as per RA 7718. • Tasked to work on PPP project development, approval, F/S, procurement works, including preparation of pre-qualification and bidding documents, monitoring and evaluation for their respective geopolitical jurisdictions.
Department of Education	• Contracting agency for PPP projects for education
Department of Tourism	• Contracting agency for PPP projects for tourism.

Related Agencies and Committees	Functions
Bureau of Treasury (BTr)	• Acts as the Secretariat for the Technical Working Group on Contingent Liabilities
Department of Environment and Natural Resources (DENR)	• Tasked to review a project's environmental impact assessment (EIA), environmental risk analysis, environmental monitoring and management plan, etc.
Department of Interior and Local Government (DILG)	• Tasked to exercise general supervision over local government units (LGUs)
Philippine Statistics Authority	• New government authority created in 2013 by merging the National Statistics Office, the National Statistical Coordination Board, the Bureau of Agricultural Statistics, and the Bureau of Labor and Employment Statistics • Statistical authority to collect data and conduct census, including on PPP.

Source: METI "Research for Facilitation of Infrastructure that Utilizes PPP, etc. in the Republic of the Philippines (2015), JICA "The Study of PPP Institutional Building in the Philippines", and interviews with related parties.

2.8 Bidding Procedures

Bidding procedures for PPP projects are stipulated in the amended BOT Law and its IRR. Both the single- and two-stage bidding procedure involves prequalification (PQ). In case of single stage bidding, all PQ requirements, technical proposal (that is compliant with the MPSS) are submitted by private sectors. On the other hand, two-stage bidding involves initial shortlisting/ prequalification of received bids based on the PQ requirements (financial, technical, legal) submitted by interested bidders. Afterwards, those who passed the prequalification then submits, particularly the final bid.

◆ Establishment of Pre-qualifications, Bids and Awards Committee (PBAC):

PBAC, a committee responsible for bid advertisement, evaluation of proposals, recommendation to award and others, is established within the implementing agency of the PPP project. The PPP Center appoints its personnel as a non-voting/ observing member of the committee. The PBAC is also responsible for approving the extensions of deadlines and other minor changes in the bidding procedure.

◆ Pre-qualification (Invitation/Advertisement and Submission and Evaluation of Prequalification Documents)

The advertisement/invitation will be published in a newspaper of general circulation, local newspaper, and website of the concerned implementing agency. If the total project cost amounts to at least PhP 500 million, the invitation may also be published in an international publication.

PQ process involves compliance with legal requirements as well as review of experience or track record and financial capability of candidate bidders.

- As a legal requirement, for projects to be implemented under a contractual arrangement which requires operating a public utility franchise and where the project proponent and facility operator are one and the same entity, the prospective project proponent or corporation, must be owned by at least 60% Filipino nationals. If the project proponent and facility operator are separate and independent entities, the facility operator must comply with the provision.
- In the determination of financial capability, the capability of prospective project proponent in sustaining its financial requirements is verified particularly in complying with the minimum equity requirement. The project proponent may also be required to submit a letter testimonial from a domestic universal/commercial bank or an international bank.[53]

◆ Pre-Bid Conference and One-on-One Dialogue

A pre-bid conference will be conducted for possible proponents to clarify any provisions, requirements and/or terms and conditions. Participation is voluntary. A detailed one-on-one dialogue between the implementing agency and the pre-qualified proponent may be held, depending on the implementing agency, after the bidding documents of the PPP project are released. If multiple proponents propose an amendment to the draft PPP agreement and there is more than 30 days till the bid submission date, and the merits of such amendment are warranted, and upon the approval by PBAC[54], the draft PPP agreement may be changed. It should be noted that the draft PPP agreement should remain consistent with the approved project parameters set by the approving body. The PBAC should ensure that any changes effected should be consistent to the approval provided by the ICC and NEDA Board. Otherwise, any change should be notified to the ICC or NEDA Board to effect the amendments in the bid documents and agreements.

◆ Submission of Bids

Bids are composed of technical and financial proposals are submitted in separate signed and sealed envelopes. (For simultaneous or single-stage qualification and bidding, another sealed envelope with the qualification documents will be submitted at the same time.)

In addition to the proposals, the project proponent will be required to submit a bid security. The bid security is to guarantee the project implementation and to suppress declining of the concession agreement. The amount and form (cash, bank credit, etc.) will be determined by the implementing agency for each project, but the minimum amount is stipulated in the amended BOT Law, as per below table.

Table 4 Required Bid Security

Project Cost	Required Bid Security

[53] A letter testimonial is to attest that the prospective Project Proponent are in good financial standing and/or are qualified to obtain credit accommodations to finance the project.
[54] If the effect to the project is large, the approval of the NEDA Board may be necessary.

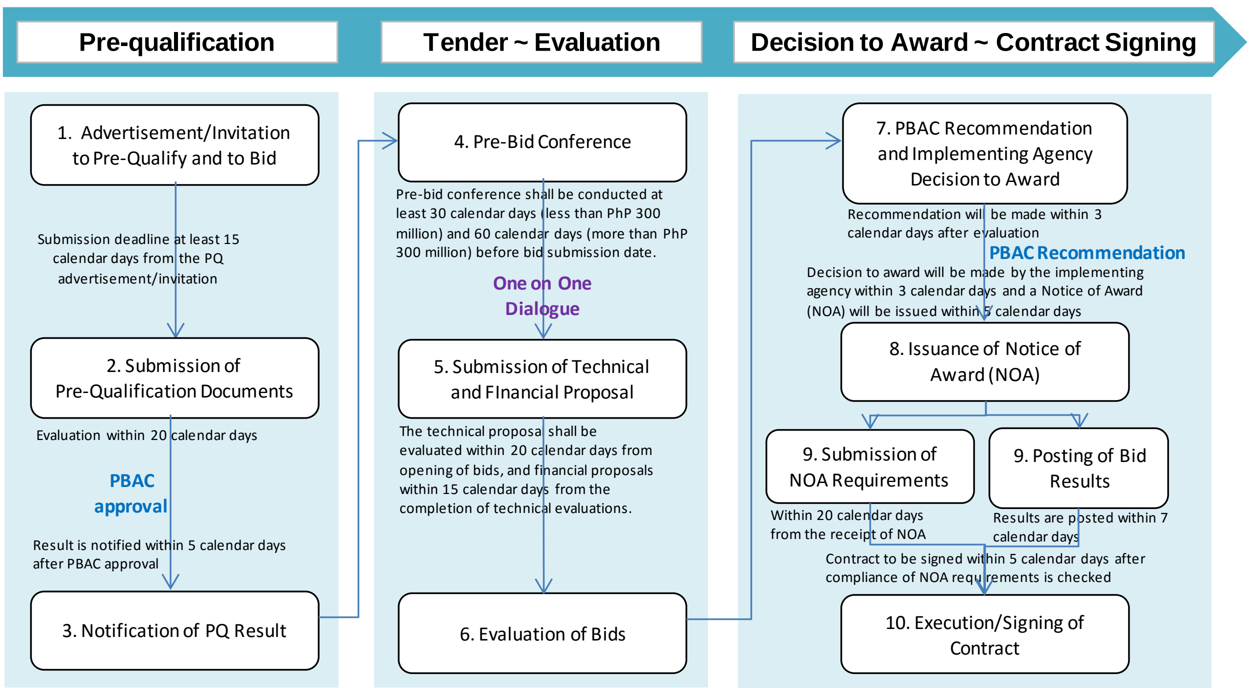
Less than PhP 5.0 billion	2.0% of the Project Cost
More than PhP 5.0 billion to less than PhP 10.0 billion	1.5% of the Project Cost or PhP 100 million, whichever is higher
PhP 10.0 billion and more	1.0% of the Project Cost or PhP 150 million, whichever is higher

◆ Evaluation and Decision to Award

The technical proposal will be evaluated first, based on a Pass or Fail method. Detailed evaluation criterion used in the evaluation for each project will be defined beforehand, but no multi criteria analysis will be conducted. The technical proposal will be evaluated on whether or not it has passed the Minimum Performance Standards and Specifications (MPSS) set for a particular project. The bid parameter is to be set by the approving body. In the approved PPP projects, the bid parameters may include the highest bid premium, albeit the government has now looked into the lowest VGF, lowest availability payment by government, lowest user fee or highest revenue share that the private sector can offer the IA.

In cases where there is only one bid submission or one complying bidder that meets the pre-qualification requirements, direct negotiation shall be resorted to, as stipulated in the amended BOT Law and Section 9.1 of IRR. The ICC sets the different negotiating parameters that will be discussed with the private sector.

Below diagram shows the 2-stage bidding procedure of a solicited proposal:



2.9 Procedures for Unsolicited Proposals

The process for unsolicited proposals, from its submission to contract signing, is stipulated in the amended BOT Law and IRR Rule 10.

◆ Evaluation and Acceptance of Unsolicited Proposals

Once a complete unsolicited proposal is received, including the feasibility study and draft PPP agreement, the implementing agency will evaluate the proposal, appraising the merits of the project and assessing the appropriateness and legality of the contractual arrangement and reasonableness of the risk allocation and others. If the unsolicited proposal is accepted, the documents will be submitted to the ICC and a reasonable Rate of Return (ROR) will be determined based on investment and operating and maintenance costs. In this process, it is the ICC that sets the ROR. Once determined, negotiation regarding the project scope, implementation arrangements, ROR, etc. will be conducted between the implementing agency and the original proponent. If the negotiation is not concluded within a period of 80 calendar days from the commencement date of negotiations, the implementing agency will have the option to reject the proposal. If the negotiation is successful, the implementing agency will report to the NEDA Board or the ICC and obtain approval for going forward with the project. The draft PPP agreement will be reviewed by the Office of the Government Corporate Counsel (OGCC), the Office of the Solicitor-General (OSG) or any other entity prescribed by law/issuances as the statutory counsel of GOCCs and LGUs, as well as the prescribed statutory counsel, and if necessary, the DOF prior to the approval of the head of the implementing agency.

◆ Invitation for Comparative Proposals and Evaluation

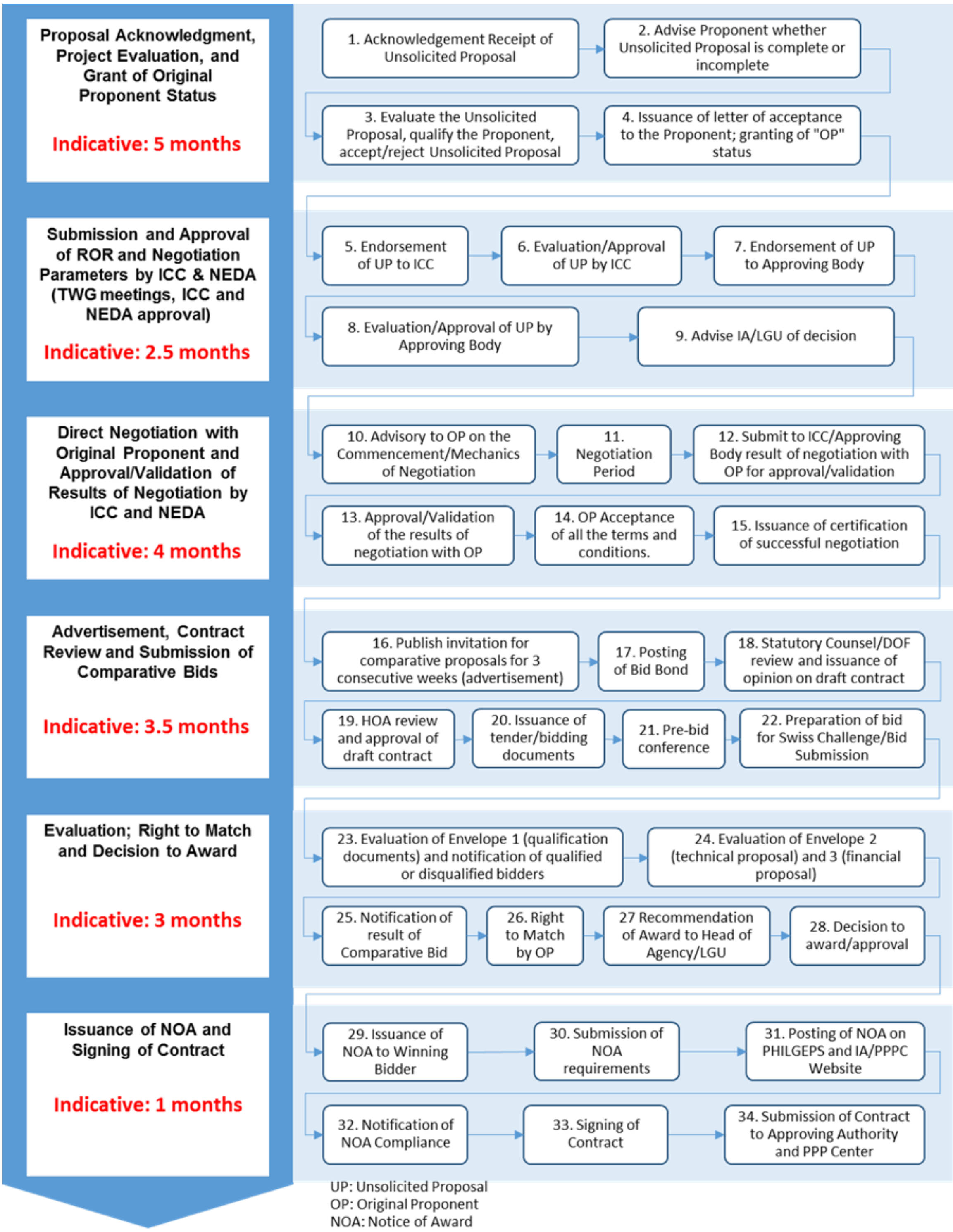
Once the approval is obtained for the unsolicited proposal, invitation for comparative proposals will be published, with a submission deadline of 60 working days from the date of issuance of the bidding documents, as stated in the BOT Law and IRR. The information that will be disclosed in the bidding documents, such as the price proposal by the original proponent, shall be mutually agreed upon between the implementing agency and the original proponent. The original proponent will be required to submit a bid bond on the date of the invitation of comparative proposals.

The comparative proponents shall submit the proposal in three signed and sealed envelopes, the first envelope containing the qualification documents, the second with the technical proposal and the third with the financial proposal. The evaluation will be conducted in three stages (Stage 1: qualification documents, Stage 2: technical proposal, Stage 3: financial proposal). Only the bids that pass each stage will be considered for the next stage, and the final evaluation will be done through the evaluation of the financial proposal.

◆ Award

In the event that a comparative proponent submits a price proposal better than that submitted by the original proponent, the original proponent will have the right to match such price proposal within 30 working days from receiving the notification from the implementing agency regarding the result. Should the original proponent match the price proposal of the comparative proponent, the project will be immediately awarded to the original proponent. If the original proponent fails to match the price proposal within the specified period, the contract will be awarded to the comparative proponent.

Below diagram shows the bidding procedure of an unsolicited proposal:



UP: Unsolicited Proposal
OP: Original Proponent
NOA: Notice of Award

3. Overview of Sectors in PPP

3.1 Toll Road Sector

◆ Implementing Agency

Department of Public Works and Highways (DPWH)

◆ Sector-specific considerations

1. Tariffs

- Although DPWH sets the base tariff, willingness to pay survey is conducted on the acceptable payment amount for users for each project, and therefore, tariffs are set per project. Tariffs are the only criteria for the price evaluation of the bidding and are determined during the bidding procedure.
- After the base tariff and parametric formula for tariff revisions are determined, it is submitted to the Toll Regulatory Board (TRB), an independent regulator for approval. Upon review, approval is given by the TRB before the start of operation.
- The tariff is planned to be reviewed every two years as per the contract, based on the formula for tariff revisions as well as consideration of figures such as the inflation rate.

2. Right-of-Way

- DPWH is basically responsible for providing the right-of-way for solicited projects. Delays in the delivery of the right-of-way to the private project proponent are a concern, as it may result in payment of liquidated damages or project termination.
- Real Property tax, as local tax, is imposed on land ownership. For PPP modalities such as BOT where the private project proponent will own the land, the project proponent's tax burden will increase, that may then affect the level of tariff.

3.2 Railway Sector and Mass Transport

◆ Implementing Agency

Department of Transport (DOTr)
Light Rail Transit Authority (LRTA)
Philippine National Railways (PNR)

◆ Sector-specific considerations

- Railway projects, especially construction of new railways involve a large amount of initial investment and a long payback period. Government guarantees can serve as a mechanism to help mitigate demand risks.
- There is a high uncertainty in the future demand for railway projects. Since railway traffic involves other transportation networks, the demand forecast requires various projections in different nodes. Moreover, forecasts are complicated as it is affected by potential developments along the railways

and conditions of the feeder transportation network. The government's policy for the railway sector must be aligned with the policies for other transportation sectors, in order to secure increase in traffic volume.

- If the actual demand is significantly smaller than the forecast, obtaining enough revenue to recover the capital costs will be difficult. If there is no government guarantee, there will be a large effect to the private project proponent and the lenders. In addition, fares may be suppressed to a low level due to political reasons. Therefore, there needs to be a flexible way of setting the fares when revenues are insufficient.
- There also is interface or compatibility risk, especially for projects that combines PPP portion and public portion and has various stakeholders, causing substantial difficulty in coordination due to different standards or method of delivery or technology.
- For railway projects, basically, the implementing agency holds the responsibility in providing the right-of-way.

3.3 Water and Sewerage Sector

◆ Implementing Agencies

Department of Public Works and Highways (DPWH)

Metropolitan Waterworks and Sewerage System (MWSS)

Local Government Units (Cities and Municipalities), Water Districts (WD)

◆ Sector-specific considerations

1. Implementing Agencies

- In the water sector, the implementing agencies for PPP projects are usually, for projects within Metro Manila and the provinces of Rizal, Cavite and Bulacan, the MWSS, and for local projects outside of Metro Manila, the WD[55] and municipalities, under the supervision of DPWH[56].

2. Tariffs

- For the Bulacan Bulk Water Supply Project, three parties (the MWSS, the private project proponent, and the WD) are involved in an agreement in supplying potable water to 24 water districts and municipalities. The project proponent supplies water to the water districts and the water districts collect water charges from the users to pay to project proponent. There are no payment guarantees by the water district; however, it deposits a certain amount to serve as the Reserve Fund[57] under the MOA signed with the Water Districts to a special account[58] before

[55] The WD is a local corporate entity that operates and maintains a water supply system in one or more provincial cities or municipalities. Development and providing technical/financial support to WDs and promotion of local water projects is conducted by the Local Water Utilities Administration (LWUA). WDs and LWUA are Government Owned and Controlled Corporations (GOCCs) Website of LWUA: http://www.lwua.gov.ph/index.html

[56] DPWH's possible involvement with WDs is through its National Sewerage and Septage Management Program (NSSMP) but so far there has been no projects developed whether PPP-type or non-PPP type.

[57] The Reserve Fund is the amount equivalent to 1% of all payments received by the Water District from its customers as payment for water supplied by the Water District, regardless of the source of the water supplied, shall be deposited in the Reserve Account. The Water District shall deposit and build up into the Reserve Fund an amount equivalent to [three months of Monthly Charges] to be maintained as the agreed level of fund

[58] The Reserve Account shall be allocated solely for the purpose of paying the MWSS and the Concessionaire amounts due to them

signing the contract, and money can be withdrawn from this special account if there are delays in the collection of water charges.

3. Right-of-Way

- Basically, the implementing agency holds the responsibility in providing the right-of-way.

3.4 Health Sector

◆ Implementing Agency

Department of Health (DOH)

◆ Sector-specific considerations

- The general public, and relevant government agencies, often consider that hospital operations and medical services in the Philippines should not be implemented as PPP type of projects. There are concerns that delivery of medical services through user-fee based PPP goes against the mandate of public hospitals which should cater to lower income groups. However, the number of medical facilities is not sufficient. There are only 72 public hospitals and most of their facilities are aging and medical equipment are limited if not outdated. Public hospitals being operated by some LGUs also face the same issues. Therefore, there is recognition that urgent upgrades utilizing the private sector funds and knowledge is necessary. There needs to be further consideration of how medical services shall be provided to the patients, including the low income group, as well as the appropriate type of PPP modality to be implemented in the health sector.
- However, PPP types of projects which are not under the BOT law have already been practiced in the medical equipment provision, its maintenance and staffing service of some public hospitals.
- In the DOH, establishment of a new PPP unit centralized around the DOH staff has been considered from late 2014. In 2015, a committee-based new PPP unit was established with a more strategic view of establishing a distinct unit within the Department. Capacity building of the unit is currently being done through the assignment of new staff, who shall undertake preparation, procurement, and management of projects.

under this Agreement. If the Water District fails to pay the Monthly Charge or any amount due from it hereunder, the funds in the Reserve Fund shall be applied to the unpaid Monthly Charge or such amount due, provided that the Reserve Fund shall be restored or raised to its agreed level if diminished.

Table 5 PPP Pipeline Projects in the Toll Roads Sector

PROJECTS	INDICATIVE PROJECT COST (PHP)	AGENCY	PREPARATION OF BUSINESS CASE/ FEASIBILITY STUDIES	UNDER EVALUATION (by concerned agencies)	ICC APPROVAL	NEDA BOARD APPROVAL	BIDDING STAGE	CONTRACT AWARD	WINNING BIDDERS/STATUS
Completed and Operational Projects									
Daang Hari-SLEX Link Road (Muntinlupa-Cavite Expressway) Project	2.23 B	DPWH	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	Ayala Corporation
PPP for School Infrastructure Project (PSIP) Phase I	9.89 B	DepEd	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	Consortium of BF Corporation-Riverbanks Development Corporation and Citicore Holdings Investment, Inc.-Megawide Construction Corporation
Automatic Fare Collection System (AFCS)	1.72 B	DOTr	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	AF Consortium
NAIA Expressway (Phase II) Project	17.93 B	DPWH	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	Optimal Infrastructure Development Corporation (SMC)
Projects under Construction									
PPP for School Infrastructure Project (PSIP) Phase II	3.86 B	DepEd	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	1. Megawide 2. Consortium of BSP Co. Inc. and Vicente Lao Construction
Mactan-Cebu International Airport Passenger Terminal Building	17.52 B	DOTr	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	GMR Infrastructure and Megawide Consortium
Metro Manila Skyway (MMS) Stage 3 Project	37.43 B	Toll Regulatory Board						COMPLETED	Citra Central Expressway Corporation (CCEC)
Southwest Integrated Transport System (ITS) Project	2.50 B	DOTr	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	MWM Terminals, a consortium of Megawide Construction Corp. and WM Property Management Inc.
MRT Line 7 Project	62.70 B	DOTr						COMPLETED	Universal LRT Corporation BVI Limited (ULC)
Bulacan Bulk Water Supply Project	24.41 B	MWSS	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	SMC – K Water Consortium
Civil Registry System Information Technology Project (Phase II)	1.59 B	PSA	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	Unisys Public Sector Services Corporation (Unisys)
Cavite - Laguna (CALA) Expressway	35.43 B	DPWH	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	MPCALA Holdings , Incorporated
Projects under Pre-Construction									
LRT Line 1 Cavite Extension and O&M	64.9 B	DOTr	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	Light Rail Manila Corporation (consortium of Ayala Corporation, Metro Pacific Light Rail Corporation and Macquarie Infrastructure Holdings)
South Integrated Transport System Project	5.20 B	DOTr	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	Ayala Land Inc.
NLEx-SLEx Connector Road	23.20 B	DPWH	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	COMPLETED	Metro Pacific Tollways Development Corporation (MPTDC)

PROJECTS	INDICATIVE PROJECT COST (PHP)	AGENCY	PREPARATIO N OF BUSINESS CASE/ FEASIBILITY STUDIES	UNDER EVALUATION (by concerned agencies)	ICC APPROVAL	NEDA BOARD APPROVAL	BIDDING STAGE	CONTRACT AWARD	WINNING BIDDERS/STATUS
Other Projects									
Operation & Maintenance of LRT Line-2	No CAPEX	DOTr & LRTA	COMPLETED	ONGOING					
Road Transport IT Infrastructure Project (Phase II)	0.298 B	DOTr & LTFRB	COMPLETED	ONGOING					
Regional Prison Facilities through PPP	50.20 B	DOJ & BuCor	COMPLETED	ONGOING					
LRT Line 6 Project	65.09 B	DOTr	COMPLETED	ONGOING					
Manila Bay Integrated Flood Control, Coastal Defense and Expressway Project	TBD	DPWH		COMPLETED	UNSOLICITED ONGOING EVALUATION				
East-West Rail Project	TBD	PNR		COMPLETED	UNSOLICITED ONGOING EVALUATION				
Clark International Airport Expansion Project – Engineering,Procurement and Construction (EPC)	TBD	BCDA		COMPLETED	COMPLETED	COMPLETED	UNDER PROCUREMENT		
New Nayong Pilipino at Entertainment City Project	TBD	DOT	PROJECTS UNDER DEVELOPMENT (UNDERGOING STUDIES, COMPLETED STUDIES, REQUESTED PDMF SUPPORT)						
Philippine National Railways Commuter System Operation and Maintenance Component	TBD	DOTr							
Integrated Transport System-North Terminal Project	TBD	DOTr							
San Ramon Newport Project	TBD	ZAMBOECOZONE							
Cebu Bus Rapid Transit (BRT) Project - System Manager and Operator Contracts	TBD	DOTr							
Duty Free Retail Development Project	TBD	DOF							
One DTI Building Complex Project	TBD	DTI & NDC							
Motor Vehicle Inspection System Project	TBD	DOTr							
Clark International Airport Operations and Maintenance Project	TBD	DOTr & BCDA							
Judiciary Infrastructure Development throughPPP Project	TBD	Supreme Court							
Rural Dairy Industry Development Project	TBD	DA & NDA							
Metro Manila Bus Rapid Transit (BRT) Project - System Manager and Operator Contracts	TBD	DOTr							
New Bohol (Panglao) Airport Operations and Maintenance	TBD	DOTr & CAAP							
Bonifacio Global City - NAIA BRT Project	TBD	BCDA							
National Broadband Plan - Accelerated Tower Build(Access) Project	TBD	DICT							

Source: PPP Center Website (http://ppp.gov.ph/?page_id=26075)

4. Joint Ventures with Philippine Government Agencies

Aside from PPPs under the BOT Law, there are different means of partnering with Philippine Government Agencies. These are called Public-Private Joint Ventures which are governed by a different set of guidelines and procedures.

4.1 Partnering with Philippine Government through Joint Ventures

Unlike other PPP modalities in the BOT Law the private sector can also undertake Joint Venture (JV) agreements. Section 8 of Executive Order (EO) No. 423 mandates the NEDA, in consultation with the Government Procurement Policy Board (GPPB), to issue the necessary guidelines on Joint Ventures (JVs). JV guideline shall cover GOCCs, GCEs, GICPs, GFIs, and SUCs while it shall not cover LGUs. Infrastructure projects under JV guideline are approved by either NEDA ICC or Head of the Government Entity concerned[59].

Table 6 Approving Authorities of JV projects

NEDA	• Infrastructure projects as defined Section 5.9, 5.11, negotiated JVs and ones which are not related to primary corporate mandate, with government contribution amounting PhP 150 Million and above
Head of the Government Entity concerned	• Projects not covered by NEDA ICC

Table 7 Main JV Infrastructure Projects approved by NEDA ICC (Section 5.9)

- Power plants
- Highways
- Ports
- Airports
- Canals
- Dams
- Hydropower projects
- Water supply
- Irrigation
- Telecommunications
- Railroad and railways
- Transport systems
- Land reclamation projects
- Industrial estates or townships
- Commercial/real estates
- Housing
- Government buildings
- Tourism projects
- Public markets
- Slaughterhouses,
- Warehouses
- Solid waste management
- Information technology networks and database infrastructure
- Education and health facilities
- Sewerage
- Drainage
- Dredging and other infrastructure, and
- Development projects as may be authorized by the Government Entity pursuant to these Guidelines.

59 Details on the Revised Guidelines and Procedures for Entering Into Agreements Between Government and Private entities can be found in: http://www.neda.gov.ph/wp-content/uploads/2014/03/2013-Revised-JV-Guidelines.pdf

JV Agreements enter through agreement or through the formation of a JV Company. Portion of equity in the JV Company by the Government Entity shall be equal to or less than fifty percent of the outstanding capital stock of the JV Company. On the other hand, the private sector must be mostly owned by Filipino (equal to or more than sixty percent) and must be also registered with the SEC in the case of a public utility franchise requirement.

4.2 Modes of Implementing Joint Ventures

The Revised Guidelines and Procedures for Entering into Agreements between Government and Private Entities published by NEDA indicate two modes wherein the private sector can have joint ventures with government agencies: Competitive selection and Negotiated JVs.

In Competitive selection, the Government Entity shall prepare bidding documents including feasibility study or a business case/pre-feasibility study of the project and draft contract.

On the other hand, Negotiated JVs can be implemented in cases where the private sector formally submits a JV proposal with a government entity or if a competitive selection of a JV partner by a government agency fails.